Supreme Court, U.S.
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No. 95-166

In The

Supreme Court of the United States

October Term, 1995

NATIONAL FIDELITY LIFE INSURANCE COMPANY,
Petitioner,

vs.

GEORGE W. CHADIMA, TRUSTEE OF THE GEORGE MILTON CHADIMA AND LILLIAN ESTHER CHADIMA TRUST; SWISHER TRUST & SAVINGS BANK, AS TRUSTEE OF THE GEORGE MILTON CHADIMA AND LILLIAN ESTHER CHADIMA TRUST; GEORGE W. CHADIMA, EXECUTOR OF ESTATE OF GEORGE MILTON CHADIMA; LILLIAN ESTHER CHADIMA, EXECUTOR OF ESTATE OF GEORGE MILTON CHADIMA,
Respondents,

-and-

STATE OF IOWA, CIVIL REPARATIONS TRUST FUND,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Iowa Supreme Court has recognized the intentional tort of first-party bad faith in the insurance context. One of the elements a plaintiff must prove in order to recover is that no reasonable basis for denying the claim existed. Whether a reasonable basis for denying the claim existed is measured by an objective standard and is decided by the court where no factual issue exists. However, when, as here, a factual dispute exists the matter is properly decided by the jury. Here, the Court of Appeals for the Eighth Circuit properly applied Iowa law. The question presented is whether this court should exercise its discretionary certiorari jurisdiction to review the application of state law to the facts of this case.

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RESPONDENTS' BRIEF IN OPPOSITION

CONSTITUTIONAL PROVISIONS INVOLVED

Respondent believes that only issues of Iowa law are presented and no federal, constitutional or other questions are presented by the petition.

STATEMENT OF THE CASE

The petition raises no questions, fundamental or otherwise, regarding the Erie Doctrine but rather involves only a question of whether Eighth Circuit Court of Appeals properly interpreted and applied Iowa law to the facts of this case.

A. Statement of the Facts

Since Petitioner alleges that the decision of the Eighth Circuit was "unreasonable" or "clearly erroneous", a more detailed Statement of Facts is required to frame the issue than supplied by Petitioner.

Chadima contends that National Fidelity Life Insurance Company ("National Fidelity") intentionally tendered less money than its own records showed it owed on a death claim, intending to short change the beneficiary. To the extent that National Fidelity suggests in its Statement of Facts that a conflict between the policy and the change request form used by Chadima existed, it is both irrelevant and misleading since National Fidelity has never suggested that the conflict formed the basis for denying the claim. This supposed basis for denying the claim was raised for the first time on appeal by The American Council of Life Insurance in an amicus curiae brief and was not considered by the Court of Appeals since the policy was not in evidence. *Chadima v. National Fidelity*, 55 F.3d 345, 348 n.7 (8th Cir. 1995).

In January of 1986, National Fidelity issued a declining death benefit policy insuring the life of George Milton Chadima. This was not the coverage Mr. Chadima desired so he requested that National Fidelity convert the policy to a fixed death benefit policy of $100,000. National Fidelity refused, indicating that it would issue a new fixed death benefit policy with a death benefit of $90,000 if Chadima returned his policy to the company with an executed Policyowner Request Form.

Chadima forwarded the insurance policy and the executed Policyowner Request Form to National Fidelity as directed. The Policyowner Request Form clearly indicated that the change would not be effective until approved in writing by the company.

Chadima died on October 26, 1989 before the policy had been changed or re-issued by National Fidelity. On the date of death, the policy had a face value of $134,973.20.

Chadima's Estate filed a timely claim. When the claim was received, the requested change had not been acted upon according to National Fidelity's records. The claims manager, Jan Perrine, reviewed the file and referred it to Catherine White, a claims examiner, for National Fidelity. White reviewed the claim and the company file and determined that $136,692.72 was due under the policy. In addition to reviewing the written file, White reviewed the company's computerized records which clearly showed the original policy was still in effect. White recalls seeing Chadima's completed Policyowner Request Form which requires that the original policy be surrendered with the application and provides, "It is further agreed following completion of such requirements *the requested changes shall not take effect until approved in writing by the company*" when she reviewed the file. (emphasis added). It was clear to White that no written company approval of the change was in the file. Further, in her experience with processing claims, White believed there should be an

endorsement signed by a company officer in the file in order for a policy change to be effective. No endorsement was in the file. Consequently, after her review of the file, it was White's opinion that the policy had not been changed and that $136,000 was due under the policy. White prepared a worksheet called a Claim Review Form and requested a check for $136,692.72. Claims Manager Perrine reviewed the request for $136,692.72 and declined approval. She instructed Ms. White to alter the Claim Review Form and to request payment as though the policy had been changed. When Claims Manager Perrine decided to pay less than was owed, portions of the form were whited-out at Perrine's direction.

It is undisputed that the Policyowner Request Form, indicating the change was not effective until approved in writing by the company, was in the file prior to issuance of the first check for $91,423.97, which would have been the amount due had the policy been changed. It is also undisputed that no evidence existed to suggest National Fidelity acted upon the change request prior to Chadima's death. In fact, all evidence indicated the change had *not* been made.

Further, National Fidelity concealed the above facts from Chadima and no one from National Fidelity made any attempt to contact the estate to determine if Mr. Chadima had received confirmation of the change prior to his death.

Claims Manager Perrine admitted that the Policy Change Department of National Fidelity informed her, prior to issuance of the first check, that the policy had not been changed prior to Chadima's death. Likewise, Claims Manager Perrine was aware that no written approval of the change to Mr. Chadima's policy was made prior to his death, nor had the terms of the form required by the company to change a policy been complied with. On January 11, 1990 she tendered a check in the amount of

$91,423,97 in full payment of death benefits under the policy when she and others in the company knew the company actually owed in excess of $136,000.

National Fidelity *never* asserted that it underpaid the claim on the basis of the language of the policy making the change effective upon receipt of the change request.

After receiving the January 11, 1990 letter with a check for less than the amount due, counsel for Chadima wrote White on January 16, 1990 requesting full payment or an explanation of the reason for the denial. White turned the matter over to her boss, Claims Manager Perrine. Claims Manager Perrine responded to Chadima's attorney's January 16 letter on February 2, 1990 avoiding the questions raised in the January 16 letter and merely listed the contents of the file.

Finding Claims Manager Perrine's February 2, 1990 response unsatisfactory, Chadima's attorneys wrote to Perrine on February 7, 1990 requesting that she respond to several specific questions regarding whether, and if so when, the policy had been changed, and asking her to supply a copy of the reissued policy and an explanation of why Mr. Chadima had not been notified of the alleged change.

Upon receipt of the February 7, 1990 letter, a claims supervisor by the name of Ms. Cherry, reviewed the file for the first time. Like Claims Examiner White, Ms. Cherry concluded that the policy had never been changed. It was equally clear to Ms. Cherry that Chadima's attorneys were aware of Claims Manager Perrine's concealment and deception. Realizing the very serious nature of Claims Manager Perrine's improper actions, Cherry wrote to associate general counsel Burkett: "Please advise – do we pay the additional money or what? Policy was not re-issued prior to death –". Attorney Burkett responded,

"PAY ASAP – the add. amount & put *release* lang on back of check. Send to atty & say "we could not find **additional** written approval by Co. we thought we had so (decrease) did not take effect.".

At trial, Attorney Burkett admitted that he based his initial decision to pay less than the amount due primarily upon the fact the policy was not in the file, yet he made no effort to ascertain its whereabouts. In other words, the associate general counsel of National Fidelity participated in and ratified a decision to pay less than was due on a policy knowing he had no support for the position he was taking; when his claims manager was aware the file clearly indicated the policy had not been changed and the claims manager had actually been told that the change was not made before the death of the policyholder.

On February 22, 1990, National Fidelity forwarded a check for the balance of $46,000 without responding to any of the questions in Chadima's attorney's February 7, 1990 letter, but followed Burkett's instruction to deceive the beneficiary by referring to the fictitious "additional" written approval.

Given that, Chadima believed that National Fidelity had been less than candid on at least three occasions (*i.e.*, each time National Fidelity had communicated with the Estate regarding the payment of the death benefits), Plaintiffs insisted on a written agreement to allow them to negotiate the checks tendered by National Fidelity without waiving their right to pursue claims against National Fidelity in their handling of this claim for benefits.[1] While National Fidelity claimed it was willing to allow Chadima to cross out the release language on the check, it refused

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1. The checks contained release language which Chadima's believed might release claims the Estate had against the company for its conduct in processing the benefit request.

to enter into a written agreement reserving Chadima's rights. In addition, the face of the checks provide they expired 120 days after issuance. Through judgment entry, National Fidelity never made an unconditional tender of the full amount due under the policy, nor had it tendered interest for the period during which it insisted on the Release.

B. Course of Proceedings

Respondent believes that Petitioner has misstated the holding of the Court of Appeals for the Eighth Circuit on page 4 of its Petition. Specifically, Petitioner characterized the holding as giving the trial court the option of deciding whether a reasonable basis exists when, in fact, the court correctly applied Iowa law which requires the jury to make this determination when a factual issue exists. *Chadima v. National Fidelity Life Ins. Co.*, 55 F.3d 345, 349-350 (8th Cir. 1995).

REASONS FOR DENYING THE WRIT

I.

SUMMARY OF ARGUMENT

Chadima believes that certiorari should be denied because only issues of Iowa law and their application to the facts of this case are presented. In addition, contrary to Petitioner's assertions, the Court of Appeals properly applied Iowa law to the facts of this action and *Salve Regina College v. Russell*, 499 U.S. 225 (1991) does not dictate otherwise. Finally, the issues presented, while important to the parties, are not significantly important to warrant certiorari since they are tied to the facts of this case and any ruling by this court might be subsequently modified by either the Iowa Supreme Court or the Iowa legislature.

II.

THE PETITION PRESENTS ONLY ISSUES OF IOWA LAW WHICH ARE NOT OF SUFFICIENT IMPORTANCE TO WARRANT REVIEW BY CERTIORARI.

The issue presented in the Petition is fact specific to this case and turns upon whether Chadima introduced sufficient evidence to raise a jury question on the issue of whether a reasonable basis existed for denial of the claim by National Fidelity. While the issue is important to the parties, its importance to the public is minimal. This case involves no federal issues constitutional or otherwise. Likewise, no fundamental questions concerning the Erie Doctrine are implicated since the Court of Appeals clearly recognized that Iowa law controlled and properly applied Erie principals in ascertaining that law. Indeed, the Petition for Writ makes no claim to the contrary but rather alleges a violation of Erie because of National Fidelity's belief that the Appeals Court simply made a mistake. Even if Petitioner was correct in this belief, such a mistake does not provide a basis for certiorari.

Likewise, Respondent does not contend that the court lacks the power, in its discretion, to grant certiorari but only that since any decision rendered by this court could be modified or changed by either the Iowa courts or legislature, the issue presented is not of sufficient importance to warrant the grant of certiorari. Since it is the importance to the public, not the parties, which is relevant to certiorari, an issue which may have no binding effect beyond the case before the court is simply not important enough to warrant certiorari. *Layne & Bowler Corp. v. Western Well Works,* 261 U.S. 387, 393 (1923).

Supreme Court Rule 10 makes it clear that review on writ of certiorari is not a matter of right but discretionary with the Court.

Only when "special and important reasons therefore" exist should the writ be granted. In *Rice v Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1995), the Court stated that " 'Special and important reasons' imply a reach to a problem beyond the academic or the episodic." Again, the fact that the Iowa courts or the legislature have the final say upon the law in this area, makes the issue here academic at best. In addition, the predominance of factual issues makes this case inappropriate for certiorari.

Rule 10(a) is illustrative of the character of the reasons the Court will consider sufficient for granting a Petition for Certiorari from a court of appeals. In its current form, the Rule focuses upon important federal issues such as where a conflict exists between the circuits; a conflict between a federal court of appeals and a state court of last resort on federal issue; or when the court has departed from the accepted and usual course of proceedings. Here, there are simply no federal issues involved but rather only a question of state law which was properly decided by the Court of Appeals.

Equally significant here is the removal from Rule 10.1 in 1980 of the provision relating to decisions by courts of appeal resolving important state law questions in a way in conflict with state law. At least one commentator has indicated that this represents a decrease in the importance of such issues in light of the Erie Doctrine. R. Stern & E. Gressman, *Supreme Court Practice* § 4.10 p. 183 (7th Ed. 1993). Given the lack of far reaching implications of such decision and the court's limited resources absent a clear misapplication of the principals underlying the Erie Doctrine, which is not asserted here, these issues simply do not warrant review.

Petitioner attempts to overcome this hurdle by arguing that the Court of Appeals failed to follow Iowa law and this

constitutes a departure from usual judicial procedure sufficient to justify the granting of certiorari. At the outset, this argument misconceives the purpose of certiorari. Certiorari is not primarily concerned with the correction of errors by the lower courts but rather with the resolution of important and wide reaching issues of federal law. R. Stern & E. Gressman, *Supreme Court Practice* § 4.17 p. 193 (7th Ed. 1993). Of equal importance here, as discussed below, is that the Court of Appeals properly interpreted Iowa law.

III.

THE COURT OF APPEALS PROPERLY APPLIED IOWA LAW FINDING THAT SINCE CHADIMA HAD PROVIDED SUBSTANTIAL EVIDENCE THAT NO REASONABLE BASIS EXISTED FOR DENYING THE CLAIM THE ISSUE WAS PROPERLY SUBMITTED TO THE JURY IN THIS CASE.

The Iowa Supreme Court has recognized that an insurer may be held liable for the tort of first-party bad faith where it unreasonably denies or delays payment of a valid claim. *E.g., North Iowa State Bank v. Allied Mut. Ins. Co.*, 471 N.W. 2d 824, 828 (Iowa 1991); *Dirks v. Farm Bureau Mut. Ins. Co.*, 465 N.W. 2d 857, 861 (Iowa 1991); *Kiner v. Reliance Ins. Co.*, 463 N.W. 2d 9, 12 (Iowa 1990); *Kirk v. Farm & City Ins. Co.*, 457 N.W. 2d 906, 910-11 (Iowa 1990); *Dolan v. Aid Ins. Co.*, 431 N.W. 2d 790, 794 (Iowa 1988).

To recover on a bad-faith claim, Respondent must prove by a preponderance of the evidence the absence of a reasonable basis for denial or delaying the payment of the benefits and that Petitioner knew or should have known that a reasonable basis was lacking when it denied or delayed payment. *E.g., Dirks v. Farm Bureau Mutual Ins. Co.*, 465 N.W. 2d 857 (Iowa 1991); *Central*

Life Ins. v. Aetna Cas. & Surety Co., 466 N.W. 2d 257 (Iowa 1991).

The real question here is who decides the first element when the facts are disputed. Chadima contends the issue is for the jury, and National Fidelity contends it is for the court in all cases. National Fidelity's position simply is not the law in Iowa as recognized by the Court of Appeals.

Iowa Civil Jury Instruction 1410.1 clearly contemplates the submission of the existence of a reasonable basis for denying the claim to the jury in the appropriate case. That jury instruction[2] provides in part:

> The plaintiff must prove all of the following propositions:
>
> 1. The defendant denied plaintiff's claim.
>
> 2. There was no reasonable basis for denying the claim.
>
> 3. The defendant knew or had reason to know that there was no reasonable basis for denying the claim.
>
> * * *

If the issue could never be submitted to the jury, why is paragraph 2 included? The note to the instruction may shed some light on this question. Specifically the note provides:

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2. In *Dirks v. Farm Bureau Mutual Insurance Co.*, 465 N.W. 2d 857, 860 (Iowa 1991), the Iowa Supreme Court accepted a similar instruction as a proper statement of the law.

> Element 2, the lack of a reasonable basis for denying the claim, is an objective element. This element will usually be determined by the court as a matter of law. *Reuter v. State Farm Mut. Auto Ins. Co.*, 469 N.W.2d 250, 255 (Iowa 1991).

First, the note clearly does not require this issue to always be determined by the court since it uses the word "usually".

Next, the note makes it clear that this is an objective element of the tort. Since it is an objective element, where no factual issue exists, it is properly decided by the court. However, like so many other issues which may be determined by the court where the facts are not disputed, where they are disputed the issue becomes one for the jury.

As recognized by the Court of Appeals, Chadima's view of the Iowa law is supported by at least two Iowa Supreme Court Cases. *See Kiner v. Reliance Ins. Co.*, 463 N.W. 2d 9, 12 (Iowa 1990); *Nassen v. National States Insurance Co.*, 494 N.W. 2d 231 (Iowa 1992), *cert.denied*, 113 S. Ct. 1846 (1993).

In *Nassen v. National States Ins. Co.*, 494 N.W. 2d 231 (Iowa 1992), the Court reaffirmed that the heart of the "fairly debatable" test requires a finding by the fact finder that the company's decision was not based on an honest and informed judgement. *Id.* at 236. Indeed, the court stated:

> The "fairly debatable" test approved in *Dolan* required plaintiff to establish to the satisfaction of *a reasonable fact finder* that National States' decision to rescind her policy was not based on an honest and informed judgment. . . . Under the circumstances, *the*

> *question of bad faith was for the jury to decide.* (Emphasis added.)

Id.

Likewise, in *Kiner v. Reliance Ins. Co.*, 463 N.W. 2d 9, 13 (Iowa 1990), the court affirmed the District Court's submission of issue to the jury stating:

> . . . We believe that a reasonable fact finder could find that Reliance failed to "exercise an honest and informed judgment" on Kiner's claim, and thus could conclude that its denial was not fairly debatable. *The issue was therefore one for the jury, not for the court as a matter of law.* (Emphasis added.)

Id.

The confusion in this area has been generated by a sentence in the recent decision *Wetherbee v. Economy Fire & Casualty Co.*, 508 N.W. 2d 657 (Iowa 1993). Chadima contends that *Wetherbee* did not make the extreme change in the law suggested by National Fidelity but rather *Wetherbee* is distinguishable since only *legal* issues were involved. In *Wetherbee*, the plaintiff's husband had been killed in an automobile accident, and plaintiff sought recovery for loss of consortium under the provisions of an underinsurance policy issued by defendant. When defendant denied coverage, plaintiff sued for breach of contract and bad faith. Defendant moved for summary judgment on all counts asserting that since plaintiff had no right to bring the action, the policy did not apply. Defendant also asserted that plaintiff's loss of consortium claim was not bodily injury under the policy. Finally, defendant sought dismissal of the bad-faith claim as fairly debatable. The trial court granted the motion on the first

ground without discussion of the bad faith issues, and plaintiff appealed.

The principal issue before the court in *Wetherbee* was "whether an insured is entitled to recover underinsured motorist benefits from her insurance company when the insured has no right to bring an action in her own name against the underinsured motorist." *Id.* at 658. Since the facts were not disputed, this issue involved the legal interpretation of the phrase "legally entitled to recover damages". *Id.* at 661. That was clearly a proper matter for the court.

The second issue in *Wetherbee* was whether plaintiff's claim for loss of consortium constituted "bodily injury" under the policy. Again, this presented a legal issue of whether plaintiff's claim for loss of consortium constituted "bodily injury" required for recovery under the policy. *Id.*

After finding for the plaintiff on both of the above issues, the court turned to the bad-faith claim, which had not been addressed by the trial court. The court first assumed "the [district] Court apparently determined that Economy Fire was not in bad faith *as a matter of law* because the Court dismissed Katherine's Petition in its entirety." (Emphasis added.) *Id.* The court then cited *Kiner* and *Reuter* with apparent approval and affirmed the dismissal finding the claim to be fairly debatable. Unfortunately, the court stated without authority "Whether a claim is fairly debatable in any given situation is appropriately decided by the court as a matter of law." *Id.* at 662.

When read in context, the quoted language is clearly not intended to change existing law but merely to state the obvious that, where only the legal construction of the policy is involved, the question of whether defendant's position is reasonable should be decided as a matter of law. Indeed, the conclusion in

Wetherbee makes sense since the court found the policy provided no coverage, the failure to pay could not constitute bad faith.

Simply put, the circumstances in *Wetherbee* make it highly unlikely that the court intended to overrule prior law with merely a passing comment and with absolutely no authority or analysis. Further, when the decision is examined, it makes no sense that the court intended to change the law this drastically. While the decision is seven pages long, only two paragraphs were devoted to the bad-faith claim and only one sentence is devoted to the issue of who should decide the bad faith issue. Indeed, it was not even expressly addressed by the trial court.

The Court of Appeals, as required by the Erie Doctrine, considered and noted the apparent conflict and then resolved it stating:

> Although the statement in *Wetherbee* that whether a claim is fairly debatable is a question of law for the court to decide is inconsistent with statements in *Kiner* and *Nassen*, we do not believe the cases are irreconcilable. *Wetherbee* can be read as giving the trial court the opportunity to decide as a matter of law in the appropriate circumstances whether the insurer had a reasonable basis for denying the claim, but not mandating the court to do so. For example, the insurer in *Wetherbee* denied the insured's loss of consortium claim based on its interpretation of the governing policy and Iowa's underinsured motorist statute. 508 N.W.2d at 658-59. The trial court concluded that no coverage existed under the insurance policy, and thus, as a matter of law, the insurer could not be liable for bad faith. *Id.* at 661.

> The procedural posture of this case is more like that in *Kiner* and *Nassen*. In those cases, the parties disputed whether the insurer had a reasonable basis for denying the claim. Likewise, National Fidelity claimed to have made an honest mistake based on confusion, while Chadima painted a picture of an outright attempt to short change the estate by almost $50,000. Evidence supports both stories, creating a genuine issue of material fact as to whether National Fidelity had a reasonable basis for denying the claim.

Id. at 349.

The Court of Appeals then went on to clarify its reasoning by stating that the issue was nothing more than "the flip-side of whether the insured has met its burden of producing evidence that the insurer has no reasonable basis for denying the claim." *Id.* Indeed, the court noted that the cases relied upon by National Fidelity stand for nothing more than the proposition that Plaintiff failed to meet its burden in the particular case. *Id.* Here, however, Chadima had met his burden and the matter was properly submitted to the jury. The recent case of *Morgan v. American Family Mutual Insurance Co.*, 1995 W.L. 374784 (Iowa 1995) referred to by Petitioner is simply another example of this proposition. In *Morgan, citing Wetherbee*, without discussion the court simply finds the Plaintiff had failed to generate a jury issue on its bad faith claim.

Since the Court of Appeals properly applied Iowa law, there was no departure from established procedure let alone one significant enough to warrant granting further review.

IV.

THE COURT'S DECISION IN *SALVE REGINA COLLEGE V. RUSSELL* DOES NOT CREATE COMPELLING REASONS FOR CERTIORARI IN THIS CASE.

Petitioner argues that when this Court in *Salve Regina College v. Russell*, 499 U.S. 225 (1991) abrogated the rule that an appellate court should give deference to a trial court's interpretation of state law somehow opened upon a pandoras box of new cases which are appropriate for certiorari.

Frankly, Respondent does not understand this argument. Rule 10 by its terms is not conclusive but rather illustrative of the issues important enough to warrant granting certiorari and the resultant commitment of this court's limited resources. Respondent does not contend that the court has no power to grant certiorari here but only that it should not do so here since only an interpretation of Iowa law is involved.

In addition, this argument seems to be nothing more than a rehash of the argument made above. Again, the Petitioner predicates its argument on the premise that the Court of Appeals deviated from established law and created new law in this case or in some way acted unreasonably. As discussed above, this is simply not the case here. Even the district court recognized that this is a close issue with valid arguments on both sides. *See Chadima v. National Fidelity Life Ins. Co.*, 848 F. Supp. 1418, 1433 n.17 (S.D. Iowa 1994). Further, as the Court of Appeals so aptly recognized, the question is really nothing more than whether Plaintiff has carried its burden of proof in any given situation. *Chadima v. National Fidelity Life Ins. Co.*, 55 F.3d 345, 349 (8th Cir. 1995). Likewise, Petitioner's suggestion that if this Court does not grant certiorari it should certify the question to the

Iowa Supreme Court is both belated and without authority. Petitioner has cited no authority for the proposition that this Court has the authority to deny certiorari and order certification at the same time.

In addition, the request is untimely. It was Petitioner who removed this case to federal court in the first instance therefore they have less standing to request certification. Likewise, Petitioner has never sought certification. Indeed, when Chadima sought certification in the Court of Appeals, Petitioner made no attempt to join in the request. In other words, Petitioner was content to have the Court of Appeals decide the issue until it ruled against it and only then did certification become attractive as a way of securing a second bite of the apple. This tactic has repeatedly been rejected by the courts. *See, e.g., Perkins v. Clarke Equip. Co.*, 823 F.2d 207, 209 (8th Cir. 1987) (practice of requesting certification after adverse judgment has been entered should be discouraged); *Complaint of McLinn*, 244 F.2d 677, 681 (5th Cir. 1984) (party should not be allowed a second chance at victory after district court has decided the issue).

V.

THE QUESTION PRESENTED WILL NOT HAVE A MAJOR IMPACT ON THE INSURANCE INDUSTRY, INSURANCE CONSUMER, AND THE JUDICIAL PROCESS.

Since the question presented is a narrow one of Iowa law which could be modified or changed either by the Iowa courts or the Iowa legislature the decision is not likely have the major impact which petitioner ascribes to it. This is not a case where the court can mandate a uniform rule. Rather, each state including Iowa will be free to make its own decisions in this area.

Since, as discussed above, the decision of the Court of Appeals is nothing more than a holding that Chadima met his burden of proof under these unique facts, the flood gate argument is without merit. The issue is one which is unlikely to reoccur with any real frequency since it does not arise in all bad faith cases. As noted above, a significant number of cases arise from the denial of claims based upon legal interpretations of the policy. These cases are clearly for the court. Likewise, not all cases where the claim is denied on factual grounds will be effected since the ultimate question in these cases is whether the plaintiff has met his/her burden of proof on the issue.

CONCLUSION

Certiorari should be denied.

Respectfully submitted,

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